

## Expert Analysis

### House Panel Holds Hearing on FCPA Reform; Mukasey Testifies

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On June 14 the Crime, Terrorism and Homeland Security Subcommittee of the Judiciary Committee of the U.S. House of Representatives held a hearing on possible amendments to the FCPA.

The subcommittee heard testimony from four witnesses, including Debevoise & Plimpton partner and former federal judge and U.S. Attorney General Michael B. Mukasey, who testified on behalf of the U.S. Chamber Institute for Legal Reform.

The other witnesses were Deputy Assistant Attorney General Greg Andres, appearing on behalf of the U.S. Department of Justice; George Terwilliger, a former U.S. deputy attorney general and current partner at White & Case; and Shana-Tara Regon, director of white-collar-crime policy for the National Association of Criminal Defense Lawyers.

As described below, Mukasey, Terwilliger and Regon advocated an array of reforms and clarifications to the FCPA, while Andres, on behalf of the Justice Department, opposed such revisions to the statute. The comments and questions from representatives at the hearing indicated that there is bipartisan support on the subcommittee for at least some of the reforms that were proposed. Near the end of the hearing, subcommittee Chairman James Sensenbrenner, R-Wis., announced that the subcommittee would begin drafting legislation.<sup>1</sup>

At the hearing, Mukasey described and endorsed two specific reforms to the FCPA: the addition of an affirmative compliance defense and a clarification of the meaning of "foreign official."<sup>2</sup>

#### ADDING A COMPLIANCE DEFENSE

Mukasey endorsed amending the FCPA to include an affirmative compliance defense that would permit companies to rebut the imposition of criminal liability for FCPA violations if the people responsible for the violations circumvented compliance measures that were otherwise reasonably designed to identify and prevent such violations.

*Former U.S. Attorney General Michael Mukasey advocated an array of reforms and clarifications to the FCPA, while a Justice Department representative opposed such revisions to the statute.*

Contrasting the FCPA with Title VII of the Civil Rights Act of 1964, which affords a company accused of improper workplace discrimination with a defense to allegations of wrongdoing by employees if it had an effective and functioning anti-discrimination policy in place, Mukasey testified that the availability of such a defense actually encourages “robust systems of compliance” and would have the same effect under the FCPA.<sup>3</sup>

Mukasey also testified that the adoption of a compliance defense would make the FCPA consistent with the U.K. Bribery Act of 2010, which expressly recognizes such a defense.<sup>4</sup>

### CLARIFYING THE MEANING OF ‘FOREIGN OFFICIAL’

Under the FCPA, a “foreign official” is defined to include any officer or employee of a foreign government or any “instrumentality” thereof, but the FCPA (unlike, for example, the Foreign Sovereign Immunities Act) does not define “instrumentality.”<sup>5</sup> This lack of clarity presents an acute challenge for businesses interacting with foreign companies that are partially state-owned.

Mukasey noted that the Justice Department and Securities and Exchange Commission “consider everyone who works for an instrumentality, from the most senior executive to the most junior mailroom clerk, to be a foreign official.”<sup>6</sup>

Furthermore, the lack of a clear definition makes it difficult for companies to determine in advance what conduct may and may not present a meaningful risk of violating the FCPA and thereby conform their conduct to the requirements of the law.

Accordingly, Mukasey stated, the FCPA “should be amended to clarify the meaning of foreign official [and] indicate the percentage of ownership by a foreign government

### Mukasey also called for other reforms

- Expanded procedures for advisory opinions from both the DOJ and the SEC, the latter of which does not currently provide any such guidance to businesses.
- Limitations on the circumstances in which a corporation may be held criminally culpable on a successor liability theory for FCPA violations by a company that it acquires or merges with.
- The addition of a “willfulness” requirement for the imposition of corporate criminal liability (which would make the standard consistent with the *mens rea* threshold for individual criminal liability under the FCPA).
- Restrictions on parent company liability for anti-bribery violations by a subsidiary unless the conduct was directed or authorized by, or at least known to, the parent.<sup>8</sup>

that would qualify [an] entity as an instrumentality," with "majority ownership [as] the most plausible threshold."<sup>7</sup>

In his written testimony, Mukasey also called for four other reforms (see box, P. 18):

Although Terwilliger and Regon also endorsed the need for reform of the FCPA to provide greater clarity to businesses and reduce the level of prosecutorial discretion currently afforded by the statute, Andres, appearing on behalf of the DOJ, rejected the need for each of the proposed reforms.<sup>9</sup>

Andres stressed the breadth and depth of the DOJ's enforcement efforts under the FCPA, citing several recent examples of serious violations of the anti-bribery provisions of the law. He argued that the DOJ exercises its discretion to prosecute systemic bribe schemes involving substantial amounts, not nominal payments or isolated incidents.

He also suggested that a compliance defense is unnecessary because the DOJ already is required, under the Principles of Federal Prosecution of Business Organizations, to take into consideration the existence and strength of a company's compliance programs when deciding whether to charge the company.<sup>10</sup>

Andres noted that the DOJ also currently provides guidance regarding FCPA compliance through its opinion release program, although Mukasey pointed out in his written testimony that the program is rarely used and that the SEC has no such program.<sup>11</sup>

In the course of questioning, Mukasey also responded that even if prosecutors such as Andres exercise their discretion reasonably, companies' in-house and outside counsel necessarily tend to advocate the most risk-averse course with regard to FCPA compliance, resulting in forgone business opportunities and unnecessary and burdensome self-investigation and voluntary disclosure of even the most minor of potential FCPA concerns.<sup>12</sup>

The members of the subcommittee generally appeared receptive to the prospect of legislative reform and clarification of the FCPA. Sensenbrenner supported the proposals described by Mukasey, announced that the subcommittee would begin drafting legislation and warned Andres that the DOJ should "get the message."<sup>13</sup>

Other Republicans on the subcommittee also expressed interest in the reforms, and support extended to the Democratic side of the aisle. Virginia's Bobby Scott, the ranking member of the subcommittee, began his remarks by endorsing nearly all the proposals described by Mukasey, and John Conyers of Michigan, the ranking member of the full Judiciary Committee, was the only Democrat to express a clear rejection of the argument that the FCPA left too much discretion to prosecutors.<sup>14</sup> Even Conyers, however, indicated that he could be open to the addition of a compliance defense and a clarification of the definition of "foreign official."<sup>15</sup>

By the end of the hearing, it appeared likely that that Congress soon will consider legislation to amend the FCPA, the first such effort in well over a decade.

## NOTES

<sup>1</sup> The Foreign Corrupt Practices Act: Hearing Before the Crime, Terrorism & Homeland Sec. Subcomm. of the H. Jud. Comm., 112th Cong. 41 (June 14, 2011) (hearing transcript).

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<sup>2</sup> *Id.* at 8-10.

<sup>3</sup> *Id.* at 9.

<sup>4</sup> The Foreign Corrupt Practices Act: Hearing Before the Crime, Terrorism & Homeland Sec. Subcomm. of the H. Jud. Comm., 112th Cong. 4 (June 14, 2011) (written testimony of Michael B. Mukasey), available at <http://judiciary.house.gov/hearings/pdf/Mukasey06142011.pdf>.

<sup>5</sup> 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

<sup>6</sup> Hearing transcript at 9.

<sup>7</sup> *Id.* at 10.

<sup>8</sup> Mukasey testimony at 9-15.

<sup>9</sup> Hearing transcript at 7-8, 10-14, 39.

<sup>10</sup> *Id.* at 7-8, 19-20.

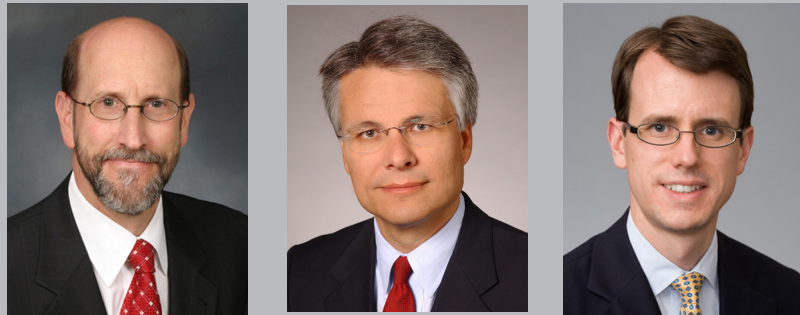
<sup>11</sup> *Id.* at 32; Mukasey testimony at 9-10.

<sup>12</sup> Hearing transcript at 15, 17, 19.

<sup>13</sup> *Id.* at 37-38, 40-41.

<sup>14</sup> *Id.* at 3-5.

<sup>15</sup> *Id.* at 5.



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